

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RODERICK TOLBERT,

Petitioner,

v.

MITCH PERRY,

Respondent.

CASE NO. 2:11-14921

HONORABLE PAUL D. BORMAN
UNITED STATES DISTRICT JUDGE

**OPINION AND ORDER DIRECTING THE CLERK OF THE COURT TO TRANSFER
THE MOTION FOR A CERTIFICATE OF APPEALABILITY AND MOTION TO
PROCEED *IN FORMA PAUPERIS* ON APPEAL TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT**

On February 26, 2014, this Court denied petitioner's application for a writ of habeas corpus and denied petitioner a certificate of appealability or leave to appeal *in forma pauperis*.

On March 27, 2014, petitioner filed a notice of appeal with the United States Court of Appeals for the Sixth Circuit. On the same day, petitioner filed a motion for a certificate of appealability and a motion to proceed *in forma pauperis* status on appeal. For the reasons that follow, the Court will order that petitioner's motion for a certificate of appealability and the motion to proceed *in forma pauperis* on appeal to be transferred to the United States Court of Appeals for the Sixth Circuit.

This Court notes that the proper procedure when a district court denies a certificate of appealability is for the petitioner to file a motion for a certificate of appealability before the appellate court in the appeal from the judgment denying the petition for writ of habeas corpus or the motion to vacate sentence. *See Sims v. U.S.*, 244 F.3d 509 (6th Cir. 2001)(citing Fed. R.App.

P. 22(b)(1)). Petitioner has apparently done so in this case, although he has filed his motion with the district court, rather than the Sixth Circuit. The Court, in the interests of justice, will order that petitioner's motion for a certificate of appealability to be transferred to the United States Court of Appeals for the Sixth Circuit.

The Court will also order the Clerk of the Court to transfer petitioner's motion to proceed *in forma pauperis* on appeal to the Sixth Circuit. It is well settled that the filing of a notice of appeal transfers jurisdiction over the merits of the appeal to the appellate court. *Workman v. Tate*, 958 F.2d 164, 167 (6th Cir. 1992). Petitioner's notice of appeal divests this Court of jurisdiction to consider his motion that he be permitted to proceed *in forma pauperis* in the Sixth Circuit Court of Appeals. *See Johnson v. Woods*, No. 5:12–11632; 2013 WL 557271, p. 2 (E.D. Mich. February 13, 2013); *Glick v. U.S. Civil Service Com'n*, 567 F. Supp. 1483, 1490 (N.D. Ill. 1983). Because jurisdiction of this action was transferred from the district court to the Sixth Circuit Court of Appeals upon the filing of the notice of appeal, petitioner's motion to proceed *in forma pauperis* on appeal would be more appropriately addressed to the Sixth Circuit. *See Baker v. Perry*, No. 2:12–10424; 2012 WL 6097323, p. 2 (E.D. Mich. December 6, 2012).

IT IS HEREBY ORDERED that the Clerk of the Court transfer the “Motion For a Certificate of Appealability” [Dkt. # 16] and the “Application to Proceed Without Prepaying Fees or Costs on Appeal” [Dkt. # 15] to the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. § 1631.

SO ORDERED.

s/Paul D. Borman
PAUL D. BORMAN
UNITED STATES DISTRICT JUDGE

Dated: April 23, 2014

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means or first class U.S. mail on April 23, 2014.

s/Deborah Tofil

Case Manager